In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-210

BILLIE SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, having found him "presently incompetent to stand trial," the district court abused its discretion by ordering him temporarily committed for further psychiatric study to determine whether he was competent to stand trial, and, if not, whether his condition was likely to improve within a reasonable time.

Petitioner was charged in a three-count indictment with armed robbery of a federally insured bank, in violation of 18 U.S.C. 2, 2113(a), (b), and (d). During arraignment petitioner moved orally for an examination as to his competence to stand trial. The motion was granted.

At the hearing, Dr. Otto Billig, a psychiatrist, testified that he had examined petitioner during the six months before the hearing and had concluded that petitioner was suffering from an organic brain disease which resulted in his having reduced judgment (Pet. App. A9-A10; Govt. App. 2b[1]). Billig added that petitioner's problem was aggravated by his alcoholism (Govt. App. 7b-8b, 11b). He further stated that he knew of no treatment to improve petitioner's condition and concluded that it would probably get worse (Pet. App. A11-A12; Govt. App. 7b). Dr. Billig concluded that, as a result of petitioner's condition, it would be impossible for petitioner to assist his counsel at trial (Pet. App. A11-A12; Govt. App. 3b).

On cross-examination Billig stated that while he did not regard petitioner as a dangerous individual, petitioner would in all likelihood continue to act in an antisocial manner and that, while confinement in a mental treatment facility would not help petitioner, it also would not do him any harm and might be desirable for society (Pet. App. A12; Govt. App. 8b-9b).

At the conclusion of the competence hearing, the court stated that before making a final ruling as to petitioner's competence, it would partially grant the government's motion to commit petitioner to the custody of the Attorney General at the Medical Center for Federal Prisoners in Springfield, Missouri for further examination, such commitment not to exceed 90 days (Govt. App.

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[1]"Govt. App." designates the government's appendix filed with the court of appeals. A copy of the government's brief and appendix is being lodged with the Clerk of this Court.

11b-16b; Pet. App. A4-A5, A13-A14).[2] An order for such temporary commitment was issued by the court on October 8, 1973 (Pet. App. A4-A5). The court of appeals affirmed the order (Pet. App. A6-A7). Petitioner is at liberty pending the disposition of this petition.

Petitioner contends that having found petitioner incompetent to stand trial the district court could not thereafter order him temporarily committed to the Medical Center for Federal Prisoners, under 18 U.S.C. 4244 and 4246. The court, however, made no definitive ruling regarding competence. It simply made a tentative determination that petitioner was "presently incompetent" and ordered petitioner to be temporarily committed to determine petitioner's competence to stand trial and, if petitioner were found incompetent, whether his condition was likely to improve within a reasonable period of time (Pet. App. A4-A5). At the conclusion of the hearing the court stated as follows (Govt. App. 14b-16b):

> * * * [T]he Court feels that this is a difficult matter for the Court to determine the proper or just course.
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> Under the circumstances, counsel for the defendant were [sic] entirely correct in filing the motion or suggestion * * * with respect to the competency of this defendant to stand trial, and certainly this Court recognizes, based upon the testimony and the evidence of the experience and standing of Dr. Billig, that he could, as well as anyone, give us an expert opinion about what the mental capacity is and abilities of the defendant. At the same time, this Court

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[2]The government had moved for a commitment of petitioner to the institution to determine whether his condition was likely to improve and whether his condition was such that he would be a danger to society (Govt. App. 11b-12b).

does believe that * * * the Court needs to be fully satisfied with respect to this particular defendant's present and future disposition, with respect to the matters that have existed up to this time. We are confident that Dr. Billig has given us a fair and reasonable appraisal as to the status of [petitioner] * * * [committed] to Springfield for a study and evaluation with respect to * * * his present status and physical, as well as mental condition, with regard to competency of standing trial, and * * * if the Court found that [petitioner] were not competent to stand trial, whether there should be attached a condition, or a court requirement that the United States Attorney or the defendant's attorney take steps to see, to see to some sort of civil commitment, if that is indicated as necessary. It may not be, and it may be that this is a situation where even though a serious crime is involved, that the defendant is not competent, nor his attorney in a position that they can go forward with a trial under the circumstances.[3]

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[3]The cases on which petitioner relies are inapposite. In *Jackson* v. *Indiana,* 406 U.S. 715, a mentally defective deaf mute who could not write or otherwise communicate, charged with two criminal offenses, was indefinitely committed under the relevant Indiana statute without appropriate due process safeguards. This Court specifically stated, however, that one committed under 18 U.S.C. 4244 and 4246 could be held for a "reasonable period of time" necessary to determine whether there was a substantial chance of his attaining the capacity to stand trial in the fore-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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seeable future. 406 U.S. at 733, 738. In *United States* v. *Curry*, 410 F. 2d 1372, 1374 (C.A. 4), where the defendant had already been declared incompetent, and had been committed for an indefinite period of time, the court held that the defendant could not be held unless it was determined that his release would constitute a public danger. The court added, however, that "[t]he court may, of course, detain him for a reasonable time to observe and otherwise inquire into his propensities, and also to treat him for his illness in the hope of restoring competency." 410 F. 2d at 1374. That, of course, is exactly what the court ordered here.